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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 39

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

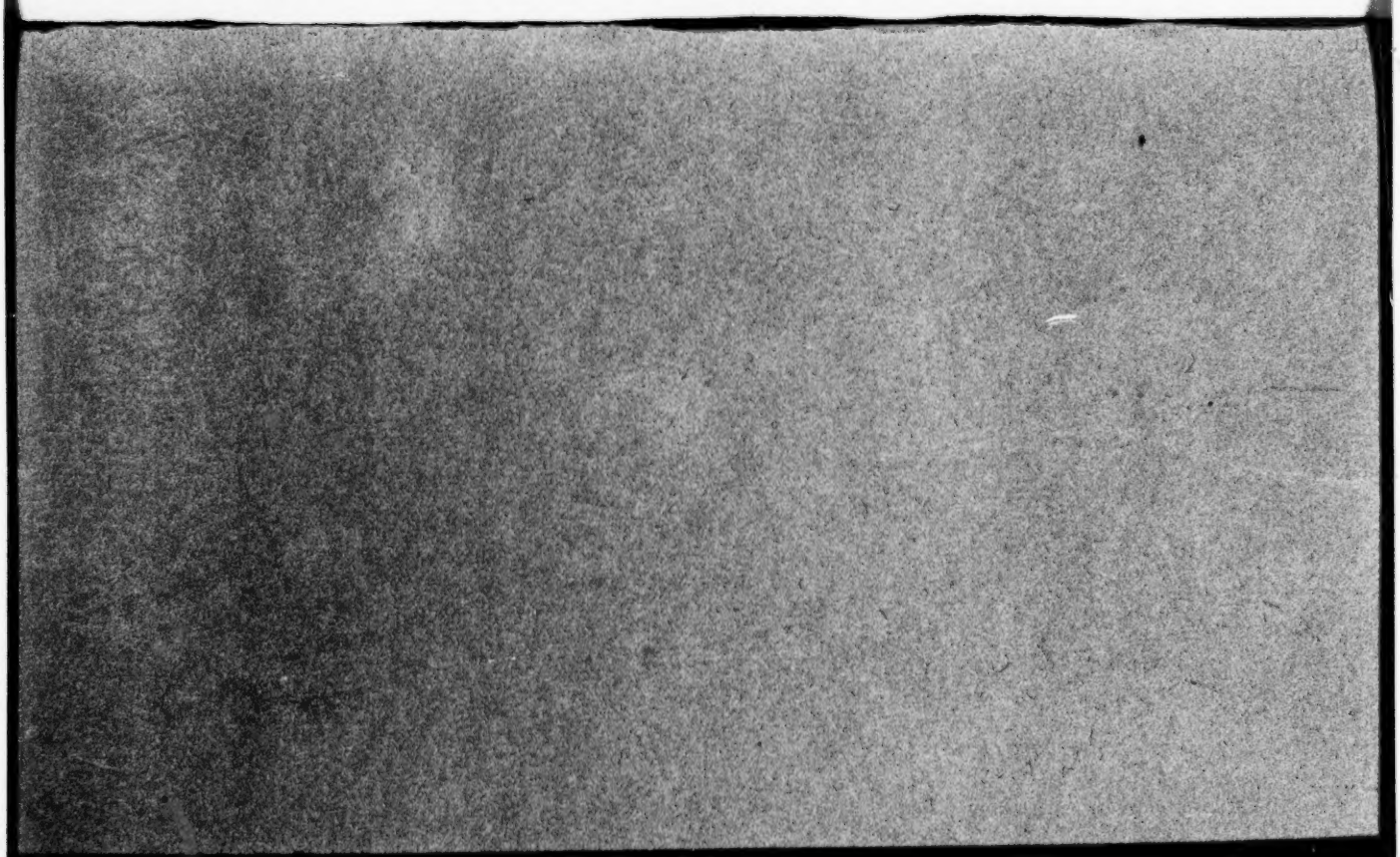
vs.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF THE GOLDEN PRESSED AND FIRE BRICK COMPANY, DEFENDANT IN ERROR.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

T. J. O'DONNELL,
Attorney for Defendant in Error.



In the Supreme Court of the United States.

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THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF THE GOLDEN PRESSED AND FIRE BRICK COMPANY, DEFENDANT IN ERROR.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

We have no criticism of the "Statement of the Case" contained in the brief of counsel for plaintiff in error, except that it states (page 2):

> "On the first day of October, 1898, an account was stated between the brick company and McIntyre, and it was ascertained

> and agreed between them that a balance of $3,787 was then due and payable."

There is no such statement contained in the certificate, which is so short that we assume this court will consult the certificate itself and not rely upon counsel's brief for its contents, hence we make no attempt to abbreviate it or re-state it.

POSITION OF DEFENDANT IN ERROR.

The defendant in error does not contend against the doctrine enunciated in the cases cited by counsel for plaintiff in error, with respect to the rights of the ordinary commercial surety—the narrowness, so to speak, of his obligation. We freely assent to the doctrine somewhat loosely expressed, that

> "Any change in the contract for which the surety is liable, made without his consent, will operate his discharge."

and that

> "a surety is discharged by a change made without his consent in the contract for the performance for which he is bound, regardless of whether or not he is damnified by such change."

These statements are mere legal platitudes; they need not the citation of authority to support them; they are known to every court and every lawyer; they are based upon reasons which are logical and conclusive, and appeal to every man's sense of justice, when applied to the class of cases in which they were enunciated.

The contention of the defendant in error is not that these landmarks of the law are to be obliterated. What we do claim is that they have no application to a case like that at bar; that the obligation, upon which this suit is brought is not such an obligation as was involved in any of the cases in which this doctrine was laid down; that the reason which impelled the courts to adopt the rule of decision, which is expressed in the excerpts quoted, do not obtain in this case, and that the form of obligation upon which this suit is brought, let alone the purposes of the statute under the compulsion of which the bond in suit was made, were unknown to the judges who wrote the opinions and the courts which decided the cases, that are sought to be perverted into authority for the position of plaintiff in error. We say that the high purposes of the statute would be defeated by a narrow construction such as has been consistently given to the ordinary contracts of commercial suretyship.

Even upon a cursory reading, the obligation provided for in the statute, and given in the case at bar, strikes the mind as differing from the ordinary commercial contract of suretyship, and this difference is accentuated by careful examination.

The usual obligation of a commercial surety is that his principal will do a definite, prescribed, ascertained thing, or pay a definite, ascertained or fixed sum of money in favor of a person or obligee named in the bond; in other words, the surety contracts for the fulfillment, by his principal, of a contract already *in esse* and as to the terms of which he is advised.

The contract between the surety and the obligee contains the contract between the principal and the

obligee. They are the same. The surety becomes liable for the performance of the contract already made with a person ascertained and named.

In the case at bar the contract is made with the United States, not for the benefit of the government, but for the benefit of merely possible persons, at the time unknown to any of the contracting parties.

Unknown to the Principal.
Unknown to the Surety.
Unknown to the Obligee.

The obligation of the surety is neither definite, prescribed, nor is it ascertained; it is ambulatory, roving, depending not on what has been agreed upon between the principal and some known person, but on what may be agreed upon between the principal and some then unknown person. The obligation is not to pay a definite, fixed or ascertained sum in favor of a person or obligee, named in the bond, but to pay (to the amount of the penalty of the bond) all possible debts that may be contracted to persons not only not named in the bond, but then unknown.

The contract which the surety undertakes shall be fulfilled, instead of being one *in esse,* is one *in futuro.* Not made; to be made.

In an ordinary case of suretyship the subjunctive mood enters into the contract but once—the surety contracts that A B having agreed to pay a certain sum to C D, if A B don't pay, C D, the surety, will. In the case at bar the contract of the surety with the government is, that:

(a) If McIntyre shall buy of anybody;

(b) If McIntyre, having bought, shall fail to pay anybody;

(c) The surety will pay every bill as to which McIntyre makes default.

The *price* for which McIntyre shall buy, the *terms* upon which he shall buy, *the length of the credit* to be given, all remain matters of convention, to be concluded between McIntyre and his unknown and merely possible creditors.

Differing, then, so widely from the ordinary contract, by which one person becomes bound to answer for the default of another, it certainly is not to be construed as if it were not what it is, but were that kind of obligation from which it so markedly differs.

This contract should be construed with due regard to the fact that it is given in pursuance of a statute, and so construed that the object of the statute may be promoted. The statute being remedial, the construction must be one that will advance the remedy.

The statute plainly intends that a contractor with the government shall furnish a bond, for two distinct purposes:

First—To secure to the government, as before, the faithful performance of all obligations which the contractor may assume towards it.

Second—To protect third persons from whom the contractor obtains materials or labor.

The ordinary bond required in such cases, before the passage of this act, secured the United States against loss.

The statute was enacted to protect third persons, not the United States.

The fact that the agreement for the protection of these third persons is inserted in the government's

bonds does not lessen the obligation of the makers of the bond towards such third persons.

The protection to be given to these persons is not to be limited by the strict rules of law in regard to the obligations of a surety on a bond.

We do not question that a surety on a promissory note, or other negotiable instrument, is released by any extension given to the principal debtor, for a definite period and upon a good consideration. That principle is established by innumerable cases, and all the cases on this subject cited by counsel for plaintiff in error are cases involving this principle. We assert, however, that the principle has no application to this case. The bond upon which this suit was brought was not made by the plaintiff in error directly to the plaintiff company, to guarantee payment for brick which McIntyre had contracted to purchase from the plaintiff company, and for which the amount and time of payment had been agreed upon. It is a bond running to the United tSates, and guarantees to the United States that McIntyre, who has contracted to build the Mint building, shall promptly pay for all labor and materials furnished for the building of the government's structure.

The policy of the government as indicated by this is a policy of supreme honesty, such as might be expected to animate a great nation with respect to its public works. This policy is that those who furnish material and perform labor upon government structures shall be paid therefor. It is for this purpose and in furtherance of this slightly altruistic principle that the bond is required. It is not required because the government might be liable to

those furnishing material or performing labor for the contractor, as the lien laws of the respective states can not be invoked against the government, and the government has no lien law of its own, and, therefore, such a thing could never happen. It is required, rather because there can be no such lien; to take the place of the lien law; to afford those dealing with a contractor for government work the same protection which the lien laws of the various states furnish those supplying labor or materials for private structures.

As we have said before, the plaintiff in error did not become surety for McIntyre upon a contract being, or about to be, entered into between him and the defendant in error. The contract between McIntyre and the plaintiff company was made after the execution of the bond. The defendant had no voice in the making of that contract, and was not a party to it. *The time in which McIntyre should make payment for the brick was a matter entirely between him and the plaintiff company.* It was a separate contract from the contract entered into by the defendant. The parties, therefore, had a right to make a contract, either leaving the time of payment indefinite, in which case the law would presume the agreement to pay within a reasonable time, or the parties thereafter might fix the time by the making of notes or otherwise, or the time might be fixed by the contract and thereafter be extended without consultation with, or any agreement on the part of, the surety company, unless circumstances existed which would render it inequitable for the brick company to so extend the time.

We assume that it will not be argued that McIntyre and the brick company might not have agreed

in the first instance for a term of credit coincident with the longest period for which it is claimed, by plaintiff in error, the time was extended or even up to the time of the commencement of this suit.

As it was competent for the parties to so have contracted in the first instance, and the surety company had no voice in the matter, was not permitted to say either aye or nay, was not even entitled to be consulted, how can it be contended that the splitting up of the period, into two or three divisions, released it from an obligation into which it had solemnly entered, in pursuance of a wise and humane statute, and for the consideration of the premium paid?

The position of the plaintiff in error is this: to illustrate; the contractor and the material man may originally contract upon a basis of a credit of ninety days, we will say.

If they do this and the contractor fails to pay at the end of ninety days, the surety company, under its contract with the government, is bound to pay.

But if the material man makes a sale upon thirty days' time, and then gives the contractor an additional credit of thirty days' time, and then another credit of thirty days, thus making the total period of ninety days, the surety company is released from its obligation.

This, in the absence of fraud, in the absence of any change in the relations, the rights or the remedies of the surety company, in the absence of its having been induced to part with anything by reason of the extension or extensions, and in the absence of its having been damnified in any way. In other words, what is claimed is that there is an arbitrary, barren, soul-

less, inflexible, technical rule which works the discharge, without justice, without merit, without right, and without reason. If this be so, the defendant in error must suffer. The plaintiff in error can keep its premium and escape its obligation.

We say such a construction construes the life and the soul out of the act. It enables surety companies, incorporated for the express purpose of *assuming and performing such obligations*, as that in this case, to collect the premium and escape the obligation.

We have been fond believers of that statement of one of the masters of the law, that when the reason of a rule ceases, or does not exist in a particular case, the rule ceases, or will not be applied to the particular case. All the authorities state that the reason for the rule that a surety is discharged by a change in the contract, the performance of which he has undertaken to answer for, is that when he is sought to be holden on an altered contract he is being held upon a contract which he did not make. For instance, one becomes surety that another will pay a certain sum of money within thirty days; *non constat* that the surety would have undertaken that the principal would make the payment in ninety days. But in this case the surety company had no right to say, and did not say, and did not contract with reference to whether the period should be thirty days, or sixty days, or ninety days, or any other period of time, so long as it was reasonable, and not so far postponed as to work a fraud upon it, as, for instance, to a time after the completion of the contract, such as to enable the contractor to divert the proceeds in other directions.

The surety in this case can not be heard when it complains it is being sued upon a contract it did not make, *for it expressly contracted with the government that it would become liable upon contracts as to the making of which it was not even entitled to be consulted.*

An extension of the time of payment under a contract releases the surety on the contract, *because it is a change in the terms of the contract, making the contract different from the one which he agreed to, and one which he might not have agreed to, if he had been consulted.* The general principle is that any material change in a contract releases the surety, because it is no longer the contract upon which he agreed to be bound; but the principle has no application to a case where a non-injurious change is made in a contract, as to the original terms of which the surety was ignorant.

The cases cited by plaintiff in error show conclusively that the surety is not discharged simply because the debtor and creditor enter into some additional contract after the making of the bond. The surety is discharged only in case the additional contract changes in some material way the contract to which the surety is a party. *In all of the cases cited the surety was a party to the original contract between the debtor and creditor, and became surety with knowledge of the terms of that contract.* In the present case the defendant became surety generally, for the brick to be furnished for the building, without the knowledge that any contract would be made with any particular person or corporation, and without knowledge of, or control over, a single provision of any such contract. The

surety company was not in any way a party to the contract which was subsequently entered into between McIntyre and the plaintiff company for the brick. It was, therefore, competent for McIntyre and the plaintiff company to agree upon such terms as to time of payment for the brick as they saw fit, and, in case McIntyre was unable to comply with such agreed terms, it was competent for the parties to agree upon other terms. The terms as to the time of payment for the brick were not in any way controlled by the original contract between McIntyre and the government, on which contract the defendant company became surety, and an extension of the time for the payment of the brick, if in fact made, would not, and from the certificate did not, in any way change the terms of that contract, or put the surety in any different position from that it occupied before the change was made.

A decision such as is asked for by the plaintiff in error should induce Congress to repeal the law under which the government accepts corporations like plaintiff in error as surety, and the states under which they are incorporated to abolish their charters.

Surety companies are a species of insurance companies. They do business upon the same principle. They exact payment of a premium considered coordinate with the risk assumed. They must not expect to have all premium and no loss. They have entered the field of modern life only recently, and in the guise of soulless corporations have assumed to perform the functions for which men in other days called upon friends, associates and business relations. Let them in this, the early stages of their appearance in courts of justice, be taught, as fire and life and other

insurance companies have been taught, by the courts, the simple rules of honesty and fair dealing, and good faith, which individuals are more and more observing towards each other.

What possible sense is there in so construing the act, and the obligation it requires, as to restrict, hamper and impede the ordinary methods of dealing between business men? Why should it be so construed as to prevent the extension of those courtesies and the granting of those accommodations upon which the vast structure of our modern business life is foundationed and without which it could not exist for a day? Such construction as that contended for by the plaintiff in error will not be found in the end advantageous even to the class of corporations to which the plaintiff in error belongs. It may serve these companies to escape obligations in particular and isolated cases, but in the vast volume of business occurring under a government whose appropriations for public works amount to hundreds of millions annually, and are constantly increasing, works conducted on a scale which cuts hemispheres in twain and reaches from sunrise to sunrise, such limitations as are sought to be engrafted on the act, to meet the exigencies of a particular case, will be found detrimental, rather than an advantage, for if a contractor, assuming the carrying out of these almost limitless undertakings, may not deal with those from whom he must obtain the labor and material to enable him to fulfill his contracts, on the same reasonable lines and according to the usual customs of business life, the corporations which are created for the purpose of furnishing just this kind of security, and which depend for profits on the premiums

earned thereby, can not but themselves suffer with the contractors whose interest it is to have the largest reasonable latitude in the management of their business.

We contend that the obligation assumed by these so-called guaranty and surety companies, in cases of this kind, is that of insurers and that they should be and are being so treated by the courts, and that the law which governs those who for a premium paid assume a possible risk should be applied to them, rather than that they should be deemed "favorites of the law," a term used (somewhat unhappily perhaps) with respect to that social surety, who from motives of kindness and friendship, without interest in the profit and without consideration, voluntarily assumed liability for the performance of contracts by, and possible faults of neighbors and friends—but this part of the discussion we will take up separately later in our brief.

THE CONSTRUCTION OF THE ACT BY THE COURTS.

Since the passage of the act in 1894 a number of cases arising under it have been decided and there are numerous reported decisions, mostly by the federal courts, but some by the state courts, in which it has been construed. Some of the federal decisions reported were made at *nisi prius* and some by the Circuit Courts of Appeals of the several circuits.

It can hardly be said there is a direct conflict between any of the reported cases—it is more accurate to say that there is a tendency towards such conflict,

particularly in view of some language in one or two of the cases, which, while strictly speaking, *obiter* only, nevertheless has a tendency toward confusion.

The line of demarcation (present or perspective) between the two classes of decisions follows somewhat that which divides the position of the plaintiff in error from that of the defendant in error in this suit.

In none of the reported cases, however, does the insurance feature of the contract, or the liability of the "surety" company as an insurer, seem to have been mooted in argument or considered in decision; rather the act is treated as remedial legislation, of a highly beneficial nature,

"intended to afford full protection to all persons that supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied."

This was the view of the case taken by the Circuit Court of Appeals of the circuit from which this case is certified in an opinion delivered by Circuit Judge Thayer, from which we quote, in United States to the Use, etc., vs. National Surety Company, 92 Fed., 549, 34 C. C. A., 526:

"It is also noticeable that in its title the act professes to be one for the benefit 'of persons furnishing materials and labor,' and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be 'the usual penal bond,' meaning, evidently, such an obligation for the govern-

ment's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. *Obviously, therefore, Congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon*, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. The bond which is provided for by the act was intended to perform a double function—in the first place, to secure the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons, from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains—the one for the benefit of the government, and the other for the benefit of third persons—are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience."

That case was decided on February 27th, 1899, and is one of the early decisions of a federal appellate court on the subject. This case was followed in U. S.

vs. Rundle et al., 100 Fed., 400, 40 C. C. A., 450, in which it was held that it was no defense to an action against the surety on a bond, in behalf of persons furnishing labor or materials under the contract, that the surety had already expended more than the penalty of the bond in the completion of the contract. There the surety had taken over the work, upon the failure of the contractor, and had expended more than the penalty of the bond, in addition to what it received from the government in completing the work: It was held nevertheless to be liable for materials and labor furnished while the contractors were attempting to complete their contract. The action was brought for the use of a bank, to which the claim had been assigned, and it was contended that the causes of action, so far as they ran against the surety, were not assignable. The appellate court in its opinion (page 454 of 40 C. C. A.) said:

"This is too narrow a construction of the legislation in question. We agree with what was said in the case of the U. S. vs. the National Surety Co. (supra) regarding its purpose."

And after quoting from the opinion in the latter case the Ninth Circuit Court of Appeals holds, that a limited construction of the act might very well deprive those for whom the security was intended from realizing on their claims by assignment.

A case of the same title was decided by the Circuit Court of Appeals of the Ninth circuit, 1901, but no question involving the construction of the act was before the court, the matter in issue being rather whether a bank which had advanced money to a con-

tractor to pay laborers, without taking any formal assignment of the claims of the laborers, could recover of the surety, and this was decided in the negative.

United States vs. Rundle, 107 Fed., 227; 46 C. C. A., 251.

In The U. S., to the use of Sica, vs. Kimpland et al., 93 Fed., 403, the security afforded by the statute was treated as analogous to that afforded by the lien law as in U. S., etc., vs. National Surety Company, decided in the Eighth circuit and quoted from *supra*, it was said:

"Hence the U. S. required that these two essential elements (materials and labor) of the construction should be paid for by the contractors, *thereby avoiding all trouble from liens and affording security* to those inclined to aid the work."

The last case was brought by a boarding house keeper who had boarded the men of the contractor engaged in the construction of a fortification in New York harbor, and the boarding house keeper claimed that inasmuch as the contractor had agreed with her to deduct from the wages of the laborers the amount due her for board of the laborer, such amount might be recovered against the surety if the contractor had not in fact paid the laborer.

In U. S. Fidelity & Guaranty Co. vs. Omaha Building and Construction Co., 116 Fed., 145, decided April 1, 1902, the Circuit Court of Appeals of the Eighth circuit, speaking through Judge Caldwell, decided that it was no defense to an action brought upon a bond given under a state statute similar in

all respects to the act of Congress that there had been a failure to reserve from the partial payments made from time to time, 15 per cent. provided by the contract to be retained until the final estimate.

We think it eminently fair to say that in these cases the rule that "a surety is a favorite of the law," that "any alteration, however slight, in the contract, although it may be for the benefit of the surety," and the other kindred doctrines laid down in the private suretyship cases, some of which are cited in the brief of plaintiff in error, and which are so numerous in the books, was entirely ignored, although none of the considerations advanced in this brief in support of the position of the defendant in error here were impressed upon the courts deciding them or taken cognizance of in the opinions delivered.

The general principles enunciated in these cases were followed by the state courts, in actions arising upon bonds given under the act of Congress in

Griffith et al. vs. Rundle et al., 23 Wash., 453, and

U. S., for use of Snyder, vs. Hazzard, 53 App. Div. Sup Ct. of N. Y., 410.

To the same effect is the decision of the Circuit Court of Appeals of the Second circuit, in Mullin et al. vs. U. S., for use of Chapin-Hall Lumber Co., 109 Fed., 817; 48 C. C. A., 677, cited by counsel for plaintiff in error.

In other cases arising under the act the surety company has been treated absolutely as a gratuitous or private surety would be under the commercial law as it was known before corporations like the

plaintiff in error came into existence, and the leading case of this class is The United States, etc., vs. the American Bonding and Trust Co., etc., which is reported in 89 Fed., the opinion of District Judge Morris being found at page 921 et seq., and the opinion of the Circuit Court of Appeals in the same volume immediately following s. c., 32 C. C. A., 420, though we insist that, under the facts of this latter case, the expressions of the court relied upon by counsel for plaintiff in error, and which apparently form the sole basis for the contentions of plaintiff in error here, are mere *obiter*.

Right here we may as well state that we do not contend and have never contended that such a state of facts may not arise, as that an extension of time of credit to a contractor secured by a bond like that set out in the certificate, will discharge the surety, but we do say that the mere extension of the period of credit originally extended to the contractor, will not of itself, in the absence of fraud and without the intervention of some equitable principle, discharge the surety company.

There are facts in the case last mentioned which clearly bring it within the rule we acknowledge and take it, without the facts stated in the certificate.

The action there was brought for Heise, Bruns & Co., material men, who will hereafter be referred to as such.

The bonding company had, before becoming surety for the contractors, "endeavored to ascertain the business and financial standing of the latter by sending printed questions to the plaintiffs in error making extended inquiry as to the financial condi-

tion, habits and methods of the latter. Among those of whom they inquired were the material men, who were asked if they were aware of the contractors being under any obligation or liabilities whatever. This question was, by the material men, answered in the negative, and being asked in the same way if the contractors were prompt in paying ordinary debts, the material men answered "yes." At the very time the answers were made the contractors owed the material men a large amount of money under such circumstances as showed these answers to be untrue."

The contractors were bankrupts at the time the suit was brought.

The opinion of the district judge, deciding the case against the material men, was largely based upon the misrepresentations and actual fraud of these answers, and the conclusions of the trial court on these subjects were adopted by the Circuit Court of Appeals, which, speaking through Waddill, D. J., says: "This alone was sufficient to dispose of the case and justify judgment against the plaintiffs." But, in addition to these facts, it appeared while the plaintiffs were to be paid for the material which went into the government work, as payments were received by the contractors from the government, and the government made payments from month to month, that during the running of said transactions $6,500 was actually paid by the contractors to plaintiffs. This money was applied to the extinguishment of the whole of the original debt, outstanding at the time plaintiffs answered the question by which they represented that the contractors were not indebted at all, and that none of the money received from the government was applied on account

of materials furnished for the government work, except $185. So the court says:

"Indeed, as far as possible, in the dealings between the parties, it would seem that the materials furnished for the government building were allowed to remain unpaid for, and, instead thereof, notes were accepted in settlement therefor, continuing and extending the debt beyond the period for which the government contracts were made upon the building, and, indeed, until the contractors had failed" * * * "Upon this state of facts * * * it would be manifestly unjust and unfair to allow plaintiffs in error to thus apply the money they had received for work done on the government building and then require the defendant in error to make good to them a debt that would have been worthless but for the application thereto of money received from the government which ought to have been applied to the payment of the debt for which the surety was bound."

(Op. Ct., pages 930-931.)

And so the court says:

"Upon the *facts* of this case, it seems clear to us that plaintiffs in error were not entitled to recover in any event."

The case cited can not be considered as authority for the contention of plaintiff in error in this case.

The *facts* defeated the right of recovery there. To have allowed recovery in that case would have been a fraud upon the bonding company; to deny recovery in the case at bar is to allow the bonding company to commit a fraud by escaping its just obligation for the assumption of which it demanded and received a premium.

The only reason that case can be claimed as authority for the position of the bonding company here is that in the prayers of defendant granted by the trial court were these two:

(1) The material men having taken the contractor's notes for the amount due for material furnished the contractors, the time of payment of which extended beyond the completion of the government work and the payment therefor by the government under the contract, they were thereby disentitled to recover in the bond, and that

> "a contract of suretyship should be strictly construed, and not extended by implication."

As to the latter declaration of law, the Circuit Court of Appeals says: "There can, in our judgment, be no doubt of the correctness of this statement of law. *When the rights of sureties are involved, they are only bound by contracts which they have signed.*" This is a correct statement of abstract law, and applies, as in the precedents cited in its support to all cases, when the measure of the sureties' liability, the contract between the principal and the obligee, is the one upon which the surety is likewise bound.

The quotation from the opinion, "They (sureties) are only bound by the contract which they have signed," as well as the language of Mr. Justice Field in Reese vs. U. S., 9 Wall, 13, shows the inapplicability of the doctrine to a case like the one at bar, and that the reason which induced its adoption in the cases where it has been so well applied has no relation to a class of contracts such as this, as here none of the

terms of the contract for which he has agreed to become responsible are known to, much less signed by, him.

And so, in discussing the first prayer which we have mentioned, the court supports, with familiar quotations from undisputed authorities, the effect on the *rights of* a surety of extending the time of payment of the debt for which the surety is bound. The distinction made, in this brief, between this class of cases and the ordinary commercial suretyship, where surety and principal agree to and are both bound by and upon the same contract, does not seem to have been called to the attention of the learned Circuit Court of Appeals, nor is it considered in the opinion.

The case is one that seems to fit most remarkably this language of the author whom all have quoted so extensively:

"While recognizing the fact that the compensated surety's agreement is in itself a contract of insurance it has seldom seemed to occur to the judicial mind that the principles of insurance law rather than those of suretyship should be applied to contracts of this nature." (Section 136, pages 328-9.)

United States vs. Freel (92 Fed., 299) was decided in the Circuit Court of the Eastern District of New York, February 15, 1899.

In that case the action was brought by the United States for its own benefit and upon that portion of the bond which is denominated in the act, "the usual penal bond."

The case in the Circuit Court of Appeals is reported in 39 C. C. A., 491-99 Fed., 237, and in this court, 186 U. S., 39 (46 Law Ed., 1177).

The defense (if such it may be called, though the case went off on demurrer to the complaint) was that the sureties were relieved from liability by reason of a change in the contract, the performance of which the defendants had guaranteed, by a supplemental agreement concluded between the United States and the contractor, whereby the length of the dry dock was increased 12 per cent., and its cost increased 7½ per cent., and the time of the completion extended three months, and another and later supplemental agreement, by which the location of the dry dock was changed further inland and a further extension of time for the completion thereof provided. It was held by the learned judge (Thomas) in the Circuit Court that the first change or supplemental agreement did not release the sureties because there was a clause or clauses in the original agreement which contemplated that such changes might be made, but that as to the second change it altered the nature of the contract, that it was not authorized by the principal contract, and, therefore, the sureties were discharged. The judgment was affirmed by the Circuit Court of Appeals without an expression of opinion as to the first proposition decided by the Circuit Court, and that judgment was affirmed in this court in June, 1902.

In the opinion of Mr. Justice Shiras, speaking for this court, it is said:

"However, the proposition that the obligation of a surety does not extend beyond the terms of his undertaking, *and that when this undertaking is to assure the performance of an existing contract*, if any change is made in the requirements of said contract

in matters of substance, without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case."

The language of the opinion quoted above is prudent and confines it to the class of cases to which that before the court belonged, to wit, a case where the undertaking "*is to assure the performance of an existing contract.*"

The undertaking in the case at bar, so far as it was made for parties in like situation to the defendant in error, is not an undertaking "to assure the performance of an existing contract." It is an undertaking to assure the performance of contracts not made, and nothing but the general nature of which could be understood or contemplated at the time of the making of the undertaking. This we have already sufficiently shown.

In the opinion delivered in the Circuit Court and referred to by this court, Judge Thomas says:

"It has been said that sureties are favorites of the law.

"Ludlow vs. Simond, 2 Caine's Cases, 1-29.

"It may be said better that the surety assures the performance *of a certain contract*, and his liability is conditioned inflexibly upon the continuance of the very terms of that contract.

"*If the principal parties thereto change their agreement*, there springs into being a new contract, to which the sureties are strangers, and if the guaranty

of its performance is desired it must be obtained de novo. Of this a learned judge said as follows:

> "'Now, it must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. *He receives no benefit and no consideration*, and then says that if the written engagement the surety has entered into is altered so much as a single line, although the alteration be beneficial to the surety or innocently made, he has a right to say "The contract is no longer that for which I engaged to be surety. You have put an end to the contract I guaranteed and my obligation therefore is at an end."'"

Blest vs. Brown, 6 Law T. (N. S.), 620.

Taking the case of Ludlow vs. Simond, cited above, how can the reasoning of it be made applicable to the case at bar? "The surety assures the performance of a certain contract."

Here the surety did not assure the performance of a "certain" contract, but of an uncertain contract.

Uncertain as to the time when it would be made.

Uncertain as to the party with whom it would be made.

Uncertain as to the time within when it was to be performed.

Uncertain as to the consideration for its performance.

All these matters remained to be settled between one of the principals—the contractor—and those

with whom he might contract, and in the settlement thereof the surety had no voice.

The case of Blest vs. Brown, cited by the learned judge, says, you bind the surety "to the letter of his engagement;" beyond that "you have no hold upon him." The letter of the engagement in this case is that, if the contractor does not pay for the labor and materials that go into the contract, the surety will. In the latter case it is also said, and such, we think, is the reasoning of all the cases,

"He receives no benefit and no consideration."

Such can not be said here, and, as shown in other parts of this brief, that fact is a sufficient reason for applying a different rule of construction to contracts of this kind from that which was applied to the contracts of ordinary, friendly, commercial, voluntary, neighborly surety, such as originated the law relied on by the plaintiff in error.

Again, it is said, in the opinion of Judge Thomas, quoted above, "if the principal parties thereto change their agreement, there springs into being a new contract," etc. The principal parties here are the United States and McIntyre.

The defendant in error is not a principal party, because, we take it, it is impossible to say that one is a principal party who might never have been a party at all. It not only is not a principal party, but can not be said to be a party to the contract between McIntyre and the United States, or between the United States and the plaintiff in error at all. It is a party who, by virtue of an event happening or a transaction occurring, after the making of the under-

taking, by reason of the provisions of the statute, has a right to sue upon the undertaking. His position is analogous to what is called a "Stranger to the Consideration," whose right to sue in certain cases was recognized at common law.

In the case of the United States for Use of Snyder vs. Hazzard, 53 Appellate Div., 410, an action was brought upon a bond given under the statute, by a person who had furnished material for the work. Upon the trial of the action the defendants contended that as the cement was furnished after the expiration of the time limited by the contract for the completion of the work the sureties were not liable. In the opinion it is said:

"The contract called for the completion of the work within a given time, and the bond given undertook to secure performance of the contract in all its details. But the bond went further than this, and undertook to provide that the contractors 'shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in the aforesaid contract.' The fact that the contractors failed to perform on time, thus becoming liable to the penalty of the bond, did not affect the provision of the bond to secure the payment for materials and labor furnished in the work, and as to this provision of the bond there was no limit of time. The only question under this provision of the bond was whether the material was furnished in 'the prosecution of the work provided for in the aforesaid contract.'"

U. S. vs. McIntyre, decided in the Circuit Court for the District of Colorado, November, 1901, and reported 111 Fed., 590, was an action brought upon the

same undertaking as that in suit, and Judge Riner, who decided the case, seems to take the same narrow view of the undertaking, and of the rights of parties in the situation of the defendant in error here, that was taken by the district judge in the case of the United States vs. American Bonding & Trust Company supra, but, as in the latter case, what he says is pure *obiter*, for before discussing the question of the liability of the surety the learned judge had decided that the principal, McIntyre, was not liable to the plaintiffs!

The principal not being liable, it followed, of course, that the surety was discharged, and the court had given good and sufficient reason for the discharge of the surety when it discharged the principal, and whatever it said on the subject of the rights of the sureties after that was mere moot law. See opinion of court, page 596.

In United States for the Use of Anniston Pipe & Foundry Co. vs. National Surety Co., cited supra, it was held that changes in the contract and specifications agreed upon between the government and the contractor, though without the knowledge or consent of the surety, will not release the surety from liability to persons who supply the labor or materials thereunder.

This is a change made directly by the principals, and if this contract were to be governed, so far as the rights of parties in the situation of defendant in error are concerned, by the rules ordinarily applicable in surety cases, by the rules laid down in the cases cited and depended upon by the plaintiff in error, upon the principles enunciated by the learned District Judge Morris and the learned District Judge Riner in the two

cases referred to, such changes would destroy the contract and all right of action thereon, the same as in United States vs. Freel supra.

That parties furnishing labor and materials protected by an undertaking such as that given in the case at bar, are not affected by a change in the contract made by the principals, is held not only in the federal cases which we have cited, but to the same effect is,

Doll vs. Croom, 41 Neb., 655;
Kauffman vs. Cooper, 46 Neb., 644;
Steffes vs. Lemke, 40 Minn., 27;
Cohn vs. State, 125 Ind., 514;
Dewey vs. State, 91 Ind., 173;

cited in the brief of counsel for plaintiff in error.

In United States vs. Stratford, 65 N. Y. Supl., 1051, cited by counsel for plaintiff in error, it is held that the surety is liable for materials furnished after the time stipulated in the contract for the completion thereof. It is said,

"The bond was given for the protection of persons supplying (the contractor) labor and materials in the prosecution of the work provided for in the aforesaid contract, and the fact the United States did not insist upon the fulfillment of the contract made by these defendants as party of the first part in the contract, does not give them any right to defraud the plaintiffs beneficiaries out of the value of the materials furnished for work under the contract. The bondsmen in this case were parties to the contract for the construction of this work, and they could not take advantage of a default on their part or on the part of the firm which was to do the work, to deprive plaintiff's beneficiaries of their rights under the law."

In point numbered two of brief for plaintiff in error it is said that the obligation of plaintiff in error to the defendant in error is to be ascertained by reading the bond in the light of the contract between the defendant, McIntyre, and the brick company. We say that the obligation of the plaintiff in error to the defendant in error is to be ascertained by reading the bond and the statute and inquiring whether the defendant in error furnished material to the defendant, McIntyre, for which it has not been paid.

The case of Brown vs. Markland, 22 Ind. App., 652, cited in the brief of plaintiff in error upon this point, holds that the extension of the engagement entered into by sureties must be measured by the terms of the contract of their principal. The contract referred to in that case was a contract for the erection of a school house and this contract contained a provision against the filing of liens or claims for work or materials furnished for the erection of the building. It was this contract which was referred to in the opinion as measuring the obligation of the sureties. The case is, therefore, only authority in this case for the proposition that the obligation of a surety may be measured by the terms of the contract between McIntyre and the United States. It is no authority upon the claim that the contract of the surety is to be in any way measured by the terms of the contract between McIntyre and the plaintiff brick company.

Speaking of the bond in this case, counsel for plaintiff in error, in the second paragraph of his brief, says:

"The bond alone does not contain all the surety's contract with the brick company."

This statement is of itself sufficient to defeat counsel's claim.

Can a like statement be truthfully made of the ordinary contract of suretyship? If so, then the learned judges who wrote the opinions containing expressions such as that in Blest against Brown supra were all mistaken.

THE PROTECTION FURNISHED BY THE STATUTE IN QUESTION ANALOGOUS TO MECHANICS' LIEN LAWS.

It is not attempted to be set forth in the certificate that the notes were taken in *payment* of the debt, and it will not be so presumed. We take the rule to be that a certificate of this kind is the same as with respect to the pleadings, and with respect to pleadings the rule is that the pleading must definitely aver that the plaintiff accepted the notes in settlement, satisfaction and discharge of the debt.

Homas vs. McConnell, 3 McLean, 381.
Blunt vs. Williams, 27 Ark., 374-376.
Taylor vs. Purcell, 60 Ark., 606, 611.
Hughes vs. Wheeler, 8 Cow., 77-81.
Loux vs. Fox, 171 Pa. St., 68-71.
McGwire vs. Bidwell, 64 Texas, 43.

And, besides, in a case where a creditor has a lien or security, the taking of a note does not constitute a payment.

Mehan vs. Thompson, 71 Maine, 492.
Cotton vs. Atlas Natl. Bank, 145 Mass., 43.

Bunker vs. Barrow, 79 Maine, 62.
Machine Co. vs. Brock, 113 Mass., 194.

In the National Surety Company case, supra, and other cases, it is intimated that the purpose of the law was to provide a substitute for security given by mechanics' lien laws in case of private buildings.

It is held under mechanics' lien laws that the giving of credit, taking of notes or other security, does not waive or release the lien.

Mehan vs. Thompson, 71 Maine, 492.
Western Brass Mfg. Co. vs. Boyce, 74 Mo. App., 343.
Mt. Electric Co. vs. Miles, 56 Pac., 284; 9 N. M., 512.
Cuchwa vs. Improvement L. & B. Assn., 32 S. E., 259-263.

THE BOND IN SUIT SHOULD BE TREATED AS A CONTRACT OF INSURANCE.

We have already adverted to the fact that companies of the class to which the plaintiff in error belongs are to be treated as insurers, and contracts of this kind construed and governed by the law applicable to insurance policies rather than the strict rule of law in relation to suretyship.

This species of insurance business was unknown in this country until within the last twenty-five years;

indeed, it seems that the first company to issue such bonds or policies was only incorporated in 1880.

Frost, Guar. Ins. P., 4.*

Within the United States there are now (1902) nearly a score of companies, with a large capitalization, engaged in the guaranty insurance business.

Ibid., page 5.

"The business of guaranty insurance * * * has been made to conform to customary and time-honored insurance methods * * * it is like other branches of insurance—based upon the law of general average."

Ibid., page 7.

"In legal acceptation guaranty insurance is an agreement whereby one (party called the insurer) for a valuable consideration termed (the premium) agrees to indemnify another (called the insured) in a stipulated amount."

Ibid., Sec. 1, page 11.

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*The work cited, which contains a full discussion of this subject by Thomas Gold Frost, Ph. D., of the New York bar (Boston, Little, Brown & Co., 1902), was not in the library of Congress, law division, at the time of writing this brief, April 28, 1903; hence we make fuller quotations than we otherwise should. The work can be found in the library of the department of justice.

The author divides the policies ordinarily issued by these companies into three classes—fidelity, commercial and judicial insurances. The policy in this case would come under the head of "commercial insurance"—a popular and very elastic term * * * an insurance bond or policy whereby parties to commercial contracts are * * * guaranteed against loss * * *. To this class belong policies of "contract," "credit" and "title" insurance.

Ibid., Sec. 2, page 12.

The policy in the present case comes under the sub-head of "Contract Insurance," as defined by the author.

In section 3, under the head "The Nature of Guaranty Insurance," the author asks these questions:

"Looked at from a purely legal standpoint, to what class of contracts does the instrument issued by the guaranty companies in the form of an insurance bond or policy belong? Is it in fact as well as in form a contract of insurance? Further, even assuming it to be a contract of insurance, why should it be called guaranty insurance?"

And to these questions, after complete discussion and by conclusive reasoning, it is answered that these contracts are insurance contracts in fact and in law and that

"While all guaranty insurance bonds or policies are in one sense contracts of indemnity, yet they are such only because of their inherent nature as insurance agreements, seeking to provide indemnity to those insured. Unlike strict indemnity contracts, they are

No. 39, Brief of
T. J. O'Donnell, Page 35.

With the consent of counsel for plaintiff in error, we beg to add to this portion of our brief a late case, to which our attention had not been called at the time of the oral argument, in which the subject discussed in this part of the brief is considered:

Cowles vs. United States Fidelity & Guaranty Company et al. (*Washington*), *72 Pac. Rep., 1032; decided June 26, 1903.*

issued as matters of speculation and not from motives of friendship, and are usually accompanied by formal written applications for the same, and are themselves made subject to certain conditions and limitations unknown to the more simple indemnity contracts. Then, too, they are supported by a separate and distinct consideration running from the insured to the insurer."

Again—

"In view of all that has been said in this immediate connection, can it be affirmed that fidelity, commercial and judicial bonds or policies as issued by the so-called surety companies constitute a contract of insurance, within the strict legal signification of that term? The answer to the foregoing query must unqualifiedly be in the affirmative. That such policies are essentially insurance contracts has been settled by the overwhelming authority of a large number of courts of last resort, the decisions to the contrary being few and far between."

Citing:

People ex rel. vs. Rose, 174 Ill., 310.

Guaranty Company of North America vs. Mechanics' Savings Bank and Trust Co., 80 Federal, 766; 26 C. C. A., 146.

American Credit Indemnity Co. vs. Athens Woolen Mills., 92 Federal, 581; 34 C. C. A., 161.

Bank of Tarboro vs. Fidelity & Deposit Co., 128 N. C., 366.

Jackson vs. Fidelity & Casualty Co. of N. Y., 75 Fed., 359; 21 C. C. A., 394.

Shackman vs. U. S. Credit System Co., 92 Wis., 366.

Tebbets et al. vs. Mercantile Credit Guar. Co. of N. Y., 73 Fed., 95; 19 C. C. A., 281.

People ex rel. vs. Fidelity & Cas. Co. of N. Y., 153 Ill., 25.

Eickoff vs. Fidelity & Cas. Co. of N. Y., 74 Minn., 139.

Fidelity & Cas. Co. of N. Y. vs. Crays, 76 Minn., 450.

Fidelity & Cas. Co. of N. Y. vs. Eickoff, 63 Minn., 170.

State vs. Hogan, 8 N. D., 301.

Robertson and Sons vs. U. S. Credit System Co., 57 N. J. Law, 12.

Claflin vs. U. S. Credit System Co., 165 Mass., 501.

Hayne vs. Metropolitan Trust Co., 67 Minn., 245.

Strouse vs. American Credit Ins. Co., 91 Md., 244.

Trenton Potteries Co. vs. Title Guar. & Trust Co., 64 N. Y. Supp., 116; 50 N. Y. App. Div., 490.

Minnesota Title Ins. & Trust Co. vs. Drexel et al., 70 Fed., 194; 17 C. C. A., 56.

Wheeler vs. Real Estate Title Ins. and Trust Co., 160 Pa. St., 408.

Fidelity & Casualty Co. of N. Y. vs. Yoder, 64 Pac., 1027; 63 Kan., 880.

Seaton vs. Heath, 1 L. R. Q. B. D., 1899. 782.

Dane vs. Mortgage Insurance Corporation, L. R. 1, Q. B. D., 1894, 54.

Finley vs. Mexican Insurance Corporation, L. R. 1, Q. B. D., 1897, 517.

In one of the cases cited *supra*, Bank of Tarboro vs. Fidelity & Deposit Co., 128 N. C., 366, it was said:

"In their very form and essence such bonds resemble insurance contracts and differ materially from the ordinary form coming down to us from immemorial usage."

"In the case just referred to the term 'common surety' was applied to the guaranty company, and in explanation of this use of the term the court observed that the latter

"Had voluntarily become by virtue of statute what may be called a common surety, not exactly in the nature of a common carrier, like railroad and telegraph companies, but still one of these common agencies to which are given unusual powers and which have assumed the most sacred responsibilities; * * * they are held by the policy of the law to the full measure of the responsibility they have voluntarily assumed. They may make such reasonable regulations as are necessary for their own protection or the proper transaction of their business; but *all such stipulations will be most strongly construed against a forfeiture of the indemnity for which alone the bond is given and in favor of a fair and equitable construction of the essential purpose of the contract.*"

Again, in section 4, under the heading "The Principles of Guaranty Insurance Contrasted With Those of Private Suretyship" (section 4), it is said:

"Notwithstanding the fact that the status of the 'surety companies' has been judicially defined to be that of an insurer and not that of a surety, in the strict legal sense of the term, nevertheless there has been in times past, and there still is, an effort being made to induce the courts to ingraft upon these new forms of contract practically the entire body of suretyship law and learning."

The author seems to have anticipated by nearly a year the able brief of the learned counsel for plaintiff in error. He continues:

"In view of this fact, the question presents itself whether these policies which are issued by the 'surety companies' are subject to the same rules and governed by the same principles as those bonds furnished by private sureties, once so common, but now rapidly disappearing under the system of compensated suretyship already referred to. * * *

"It may be of interest to reproduce here the remarks on this subject made several years ago by the president of one of the leading guaranty insurance companies, as showing the practical view taken of this question from the insurers' standpoint. After calling attention to the fact that, so far as the courts were concerned, the law applicable to contracts of guaranty and insurance was an unknown and untrodden field, he made these remarks, which now seem to be truly prophetic: 'They (the courts) are going to apply the same rules to corporate suretyship as they do to other insurance companies. The individual surety is always met with sympathy, but'—they will say—'we are going to be pretty strict in our interpretation of the law as against you.'"

Again, in the same section, the author says:

"Wherein, then, if at all, do the rules of law governing private suretyship apply to guaranty insurance contracts? It should be observed at the outset that the law is too well settled to admit of discussion, that ordinary sureties are favorites of the law, and their obligations are in all cases to be construed in their favor under the well known '*strictissimi juris*' rule. Therefore, it may be stated, as a general rule, that ordinary sureties are not to be bound beyond the strictest terms of their engagements, and their liability is not to be extended beyond the clear and unequivocal terms of the obligation entered into by them.

"Nowhere has the modern doctrine on this subject been better stated than by the Court of Appeals of New York, in *Ulster County Savings Institution vs. Young, 161 N. Y., 23*, in the following language: 'The liability of a surety is measured by his agreement, and is not to be extended by construction. His contract, however, is to be interpreted by the same rules which are applicable to the construction of other contracts. The extent of his obligation must be determined from the language employed, when read in the light of the circumstances surrounding the transaction. Hence, where the question is as to the interpretation and meaning of the language by which a party has bound himself, there is no difference between the contract of a surety or that of a principal or other party sustaining a different relation. It is when the intention has been thus ascertained that the principle of law '*strictissimi juris*' applies, and then it is the courts guard the rights of the surety and protect him against a liability which is not strictly within the terms of the contract.' The basis of the foregoing rule is not difficult to find. It finds its support in the recognition by the courts of what is common knowledge in the business world, to wit, that a contract of suretyship, as entered into by private per-

sons, is ordinarily a gratuitous one, induced by motives of friendship or by a promise of a similar accommodation at some future day. Again, it is often assumed hastily, without proper safeguards, in the form of contract stipulations, and almost always upon oral representations as to the risk and extent of the guaranty.

"The obligation that is assumed is voluntary on the sureties' part, entered into not only without profit, but likewise without having in view any prospect of gain. It is an act of benevolence on the part of the obligor, a convenience to the obligee, and of emphatic use to both. For these reasons the courts have said that the obligations of social duty require that the surety should be dealt with in fairness and in the utmost good faith. * * *

"*It is but natural that courts, so long accustomed to extending the 'rule of favoritism' towards the surety in the old-time private bonds, should be slow to recognize that with the passing away of the reason for the existence of a rule by the advent of the compensated surety, the rule itself should pass away.*

"The contract of guaranty insurance is invariably entered into for a compensation, and usually after the fullest investigation, and frequently under stipulations largely technical in character, based upon written representations relative to the nature and extent of the risk. The policy is written by a company incorporated for the express purpose of furnishing guaranty bonds as a means of revenue to the corporation and its stockholders. So much being admitted, the question then arises as to whether there are any valid reasons why two parties sustaining a distinct legal relationship with third persons, but bound to such third persons by contracts substantially the same in purpose, should be governed by the same rules of law? In response to this important question the following may be said by way of reply along the line of judicial answer to the foregoing

query. Bound by the supposed presence of a legal analogy between the two contracts, and at the same time overlooking the now well established fact that 'compensated suretyship' is a branch of insurance law, and as such controlled by the principles thereof, a respectable number of courts have been led into applying the traditional 'favoritism' rule to what are in reality policies of insurance, treating them as if they were in all respects identical in nature and effect with the old-time private bonds. This is very generally the case in judicial insurance, *less so in commercial insurance*, and only true to a very limited extent in fidelity insurance."

The author quotes, in support of his position, *Walker vs. Holtzclaw et al.*, 57 S. C., 459; 35 S. E., 754, where the court said:

> "Upon the hearing of the case it was argued that a surety is a favorite of the law * * * *While this is true, as a general rule, it has no application to a case like this, where the surety receives compensation and the surety is in the line of its regular business.*"

Then is quoted the language of Judge Lacombe in the leading case of *Tebbetts et al. vs. The Mercantile Credit Guaranty Company of N. Y., supra*, where, speaking for the Circuit Court of Appeals for the Second district, the learned judge observed:

> "The cases holding that a surety is a favorite of the law and that a claim against him is *strictissimi juris*, have no application. Corporations entering into contracts like the one at bar may call themselves 'guaranty' or 'surety' companies, but their business in

all essential particulars is that of insurance, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to insure persons against loss in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance and should be treated as such."

The learned author next quotes from Commonwealth vs. Equitable Beneficial Association, 137 Pa. State, 412.

"The engagements of insurers are not founded in any philanthropic, benevolent or charitable principle; it is purely a business adventure, in which one, for a stipulated consideration or premium per cent, engages to make up wholly or in part, or in a certain agreed amount, any specific loss which another may sustain."

The author continues:

"It goes without saying that under the well-settled principles of insurance law, the insurer contracts a guaranty insurance, by reason of the similarity in many respects of his agreement with that of the surety, is not entitled to be treated as a favorite of the law. The doctrine of the United States Supreme Court in

American Surety Company vs. Pauly, 170 U. S., 133,

contains a clear and explicit refutation of the doctrine that the so-called compensated surety is a favorite of the law, insofar as the same may relate to matters of construction."

The language of Mr. Justice Harlan in the last mentioned case is then quoted as follows:

> "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the insurance company, the former, if consistent with the objects for which the bond was given, must be adopted, * * * The object of the bond in suit was to indemnify and secure the bank * * * that object should not be defeated by any narrow interpretation of its provisions or by adopting a construction favorable to the company, if there be a construction equally admissible under the terms of the instrument executed for the protection of the bank."

The author then quotes from the dissenting opinion of Mr. Justice White in the last case mentioned *supra* and speaks of the difficulty of drawing just conclusions from the authorities and then speaks of the injustice of allowing a "surety company" to assume at one time the attitude of a strict surety and at another time the roll of an insurer and in the latter attitude to call to its aid all the somewhat refined principles, as well as the technicalities, of the insurance law. And then says, speaking of the class of contract involved in the case at bar:

"Many rules governing the contracts of suretyship or guaranty are herein inapplicable. As long as the primary, if not the only, purpose of the 'surety company' in issuing their policies or bonds is to secure a pecuniary benefit for themselves, this fact alone should be sufficient in law to preclude them from as-

serting such rights of sureties or guarantors as are extended to the latter solely because of their position as favorites in the eye of the law."

(Ibid., Sec. 4, p. 27.)

The reasoning and conclusions of the author express our views better and more forcibly than we can express them and this fact, together with the fact before stated, that the book in which they are found was not, at the time this was written, on the shelves of the library of this court, is our excuse for quoting *in extenso* from the work. It seems to us that the principles enunciated by the author and the cases cited effectually dispose of the theory of plaintiff in error, that it appears at this bar as a "favorite" entitled to every intendment that will assist it in escaping liability.

The cases upon which it relies are cases decided in favor of persons who assume the attitude and relation of surety as a part of the social duty which binds man to man and makes every community homogeneous, inter-dependent. In those cases friendship, good-will, kindness, consideration, the desire to assist another along the thorny path of life, was the consideration moving the surety to the execution of the contract upon which he was sought to be held.

In this case the consideration is cold-blooded, calculated, figured out by tables, measured in dollars, estimated to be sufficient to pay for the risk assumed.

Further removed than are the poles, are the motives, influences, and, in the legal sense, the consideration which moved the plaintiff in error to enter into the contract, upon which it is brought to court, from those which induce the ordinary private surety, in whose favor the principles of law, of which it now

seeks to avail itself, were enunciated, to enter into the contracts the interpretation of which was involved in the cases cited by plaintiff in error.

It would be as impossible to make one like unto the other as to make flesh out of fish or a "silk purse out of a sow's ear."

THE SURETY NOT DISCHARGED IN ANY EVENT.

Whatever may be the construction of the act, and whether the plaintiff in error be regarded as an insurer or an ordinary surety or something between, we contend that, inasmuch as the technical rule which forbids that there should be any change in the contract, the performance of which the surety has guaranteed or made himself answerable for, can not be present in this case, and no violation of it can be alleged here, there is nothing upon which to predicate a discharge of the surety.

THE PARTIES TO A CONTRACT WHICH HAS BEEN EXECUTED BY ANOTHER PARTY AS SURETY MAY STILL DEAL WITH EACH OTHER IN MATTERS OUTSIDE OF THE CONTRACT OF THE SURETY WITH THE SAME EFFECT AS IF NO SUCH CONTRACT OR SURETYSHIP EXISTED, AND SUCH DEALINGS DO NOT RELEASE THE SURETY.

The case of Benjamin vs. Hillard, 23 How., 149, involved a contract for furnishing a steam engine and

machinery, the performance of which contract was guaranteed by third parties. The time for the delivery of the machinery was fixed in the contract, and it was provided that the machinery should be delivered upon the first safe and navigable rise in the waters of the river on which it was to be delivered the ensuing spring. The contractors were unable to deliver the machinery at that time and the purchasers assented to the delay proposed by them until another rise, and the machinery was not in fact all delivered until December of the next year. It was claimed that this delay operated to release the surety. In the opinion it is said:

"It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor. *There must be another contract substituted for the original contract, or some alteration in a point so material as in effect to make a new contract, without the surety's consent, to produce that result.* But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, so as better to arrive at their end, we can find no ground for the surety to complain."

It would be difficult to find language more applicable to the case at bar.

In Roach vs. Summers, 20 Wallace, 165, the Roaches had joined with the Butlers in a note and mortgage to Summers & Co., to secure advances to be made by Summers & Co. to Butlers in connection with a plantation lease by the Butlers. The defense was

that as a part of the original agreement it was agreed that all the cotton raised on the plantation should be shipped to Summers & Co., and applied on the indebtedness, and that Summers & Co. had entered into an agreement with the Butlers which changed to some extent the amount of the proceeds of the cotton applied upon the indebtedness. In the opinion it is said:

"Waiving attention to the fact that no particular or defined interest was given to the complainants by their arrangement with the Butlers, it is plain it could not work a discharge of the sureties, *unless it placed them in a different position* from that which they occupied before it was made. *If it took away any security* they had in virtue of their contract with the complainants, it was doubtless a fraud upon them, and they are not holden by their notes and mortgages. If, when they became sureties, it was agreed by all the parties themselves, the complainants and the Butlers, that all the cotton crops raised on the demised plantation should be shipped to the complainants and credited against the advances to be made, it was bad faith to the sureties for the creditors to enter into an arrangement with the Butlers that a portion of the crops should be devoted to another use. On the other hand, if there was no such agreement respecting the crops made when the Messrs. Roach assumed their suretyship and gave their notes and mortgage, the subsequent arrangement with the Butlers was no alteration of the original contract, and had no effect upon it."

Is it pretended in the case at bar that the plaintiff in error was "placed in a different position" by the transaction certified, or that the doings between defendant in error and McIntyre "took away any security?"

Nothing of the kind is even pretended; nothing of the kind is certified.

In the case of Cross vs. Allen, 141 U. S., 528, a mortgage was made by Cross and wife upon property, a portion of which belonged to the wife. After the note and mortgage became due Cross conveyed the property to one of the mortgagees in trust to be sold and the proceeds applied upon the indebtedness. Afterwards an action of foreclosure was brought by the assignees of the mortgage and was defended by the heirs of Cross and wife, both of whom were then deceased, on the ground that as to the property of the wife she was surety only, and that the subsequent dealings between Cross and the mortgagees changed the original contract and thereby released the surety. In the opinion it is said:

"Did the conveyance by Cross to Lewis of the lands mortgaged and the subsequent transactions in relation thereto, before set out, amount to an extension of time for a definite period, or vary the terms of the original contract of suretyship? We think not. In this connection we are not unmindful of the rule that *any material change in the contract* on which he is a surety, made by the principal parties to it, without his assent, discharges the surety, even though he may be benefited by such change; *the reason being that he has not assented to the contract in its altered form and has a right to stand upon the very terms of his undertaking. Reese vs. United States, 76 U. S.*; 9 Wall., 13, 21; 1 Parsons, Notes and Bills, 239. But in this case there was no extension of time for a definite period, no new consideration passed, nor was there any material alteration of the terms of the original contract. The rights of the surety remained the same after those transactions as they were before. The transactions in this matter

were at farthest a more convenient method of enforcing payment of the original demand, and, possibly, may be considered as amounting to an aditional security. But that is all. Even that would not release the surety."

In the case of Stuts vs. Strayer, 60 Ohio St., 384, it is held that:

"To discharge a surety from liability because of a variation in the contract without his consent, it is indispensable that the variation *be in the terms of the contract by which the surety is bound.* He will not be discharged by an independent contract between the principal parties, though it may be contemporaneous and relate to the same subject, without varying the terms of the contract of the surety."

In the case at bar, as we have shown, "the contract by which the surety is bound" is the contract between the surety company and the government. That contract has not been altered one jot or tittle.

In the case of Joyce vs. Auten, 179 U. S., 591, it is held that a failure of a receiver to retain a lien on property sold, as he was directed, by the order of court authorizing the sale, does not release a surety on a note given for the purchase price. In the opinion it is said:

"There are many authorities sustaining the proposition that a surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee; or, *in other words, that the contract stands as expressed in the writing* in the absence of conditions which are known to the recipient of the promise. See, among other cases, Goodman vs. Simonds, 20 How., 343, 366;

15 L. Ed., 934, 942; Dair vs. United States, 16 Wall., 1; 21 L. Ed., 491; Merriam vs. Rockwood, 47 N. H., 81; Selzer vs. Brock, 3 Ohio St., 302, 308; Passumpsic Bank vs. Goss, 31 Vt., 315; State, Use of Bothrick vs. Potter, 36 Mo., 212; 21 Am. Rep., 440; Baylies, Sureties and Guarantors, 440; 2 Brandt, Suretyship and Guaranty, section 407."

As stated in this opinion, the contract of the plaintiff in error "*stands as expressed in the writing.*" The obligation of the plaintiff in error was to see that McIntyre promptly paid for the brick. The defendant in error was under no obligation to the plaintiff in error to render it any assistance in the performance of its duty under the bond, and should not be held responsible for the failure of McIntyre and the plaintiff in error to comply with the condition of the bond unless it has done something to the prejudice of the plaintiff in error with notice that its action would so prejudice the plaintiff in error.

In the case of Fertig vs. Bartles, 78 Fed., 866, it was claimed that a surety was released by reason of a voluntary extension to its principal of a credit greater than that originally agreed upon. In the opinion it is said:

"The fact alleged by the third plea is that the plaintiff extended a credit of $20,000 to the principal debtors, without the knowledge or consent of the defendant, and it avers that he, as surety, was, in consequence, discharged. The demurrer admits the fact, but puts at issue the legal conclusion. If the surety was discharged, it must be because, by extending the principal's credit, as stated, the plaintiffs violated some contract of theirs directly with the surety, or because such extension was made in breach of the

principal contract, or in pursuance of an alteration thereof. *There was no contract by the plaintiff with the surety limiting the credit.* The bonds which he gave, of course, fix the amount of the surety's liability, but they contain no provision in restriction of the credit to be accorded; and to the primary contract the surety was not a party, nor was the clause thereof upon which he relies inserted for his benefit. By that clause (in its final condition) it was covenanted that a credit should be given to the principals of $5,000, and that at no time should the amount due by them exceed the amount of the bond which they were to give. By permitting that amount to be exceeded, surely the plaintiffs committed no breach of covenant; and as the plea does not allege that they had made any alteration in the contract, which required them to do so, it must be assumed that the allowance of credit in excess of the amount stipulated for was wholly voluntary.

"There is no doubt that where a change is made in the original contract, without the surety's assent, he is released (Reese vs. U. S., 9 Wall., 14); but I think it is also unquestionable that where there is no 'modification,' no 'variance in the agreement,' no subsequent 'positive contract' changing the original one, the surety remains liable, even though the parties, 'without any legal constraint on themselves, mutually accommodate each other.' Benjamin vs. Hillard, 23 How., 149-165; Reese vs. U. S., supra; Insurance Co. vs. Hanford, 143 U. S., 187-191."

This authority is directly in point in this case. The only difference between the cases is that a larger credit was given, and here it is claimed a longer credit than had been agreed upon between the principal and the creditor was given, but in this case, as in that, the change in the contract, if any, was in the contract between the creditor and the principal, and

there was no change in the contract between the creditor and the surety.

There is, therefore, much greater reason for holding that an extension of the time of payment would not discharge the surety under a contract of this kind than under contracts similar to those involved in the cases above cited. In this case the time of payment was not extended beyond the completion of the contract. No such fact is set out in the certificate. The contract was not completed at the maturity of the notes, or at the time of the trial. The circumstances, therefore, which led the court to its decision in the Maryland case do not exist in this case, and there is no reason why this court should not carry out the plain intent and meaning of the statute under which this bond was given and require the defendant company to comply with its bond and pay for the brick.

The Circuit Court of Appeals of the Eighth Circuit in the late case of Wood vs. Brown, 104 Fed., 203, ~~C. C. A.~~, holds that a surety on a bond is not discharged by the release of a levy of a writ of execution upon the real estate of the principal. In the opinion it is said:

"The levy and release of an execution upon real property which does not discharge or impair the lien of the judgment or decree under which the writ was issued, does not release a surety for its payment, because it does not impair his security."

This shows that even in the case of a strict suretyship, where there is an absence of the technical rule in relation to the alteration of the contract to which we have before adverted, something must be shown

to the injury of the surety in order to discharge him from liability. In the case at bar no injury whatever is shown, or even pretended. The security, if any, which the plaintiff in error had taken from McIntyre to indemnify it was not affected, nor was the amount which McIntyre might collect from the government under his contract in any way reduced or its ability to collect any sum which it might be required to pay under this bond in any way impaired by the act of the plaintiff company. There is nothing stated in this certificate which raises any equity in favor of the plaintiff in error. The certificate shows that plaintiff in error seeks simply to avoid its liability by reason of something which in no way prejudiced its rights, but was in fact in its favor. The obligation of the plaintiff in error was that McIntyre should promptly pay for the brick. The plaintiff company might have insisted that he pay for them on delivery, and the plaintiff in error would have been obligated to see that he did pay for them, but instead, the plaintiff company extended to McIntyre a credit. This was a favor to McIntyre and to the plaintiff in error; when the term of the first credit expired it was extended; neither the first nor the second credit was given with the knowledge or consent of plaintiff in error; there is no justice or equity in the claim of planitiff in error that the giving of such credit should release it from the liability it assumed. It might as well contend that the giving of the original credit, the selling on credit for a term, instead of on terms which would require cash upon delivery, deprived the vendor of the brick of the right to hold the surety company responsible; such a claim could be made

with equal justice and without any more violence to the principles of law applicable to a case of this kind.

In the brief and argument of plaintiff in error it is contended that the use of the words "promptly make payment" in the statute limits the liability of the plaintiff in error. In our opinion the word "promptly" in this statute was put there for the benefit of the person furnishing the labor and material, not for the benefit of the surety on the bond. If the contractor has not paid at all, he has not promptly paid, and the claim that the party furnishing the material or labor can not collect unless he brings his action against the surety at once is not supported by the language of the statute, and is not in accordance with the purpose for which the statute was enacted.

This particular language of the statute was passed upon by the Circuit Court of Appeals of the Second Circuit in the case of Mullin vs. United States, for the use of Chapin-Hall Lumber Co., 109 Fed., 817, to which we have already called attention.

BRIEF OF PLAINTIFF IN ERROR.

We shall not attempt to analyze the cases relating to the general law of suretyship found in the 4th, 5th, 6th and 8th paragraphs of the brief for plaintiff in error.

We shall not discuss the 7th paragraph of counsel's brief because we are of the opinion that the matter there suggested is a matter for the consideration of the Circuit Court of Appeals and not for this court under the certificate and the questions asked.

We shall not enter upon an extended discussion of that portion of the counsel's brief called argument. To do so would be largely to travel upon a parallel line with the plaintiff in error's counsel. Our difference is fundamental.

"The plaintiff in error insists that its obligation is the *ordinary* one of suretyship."

Brief, page 10.

Here is where we differ. Granted this premise, and it is not difficult to arrive at counsel's conclusion. Counsel proceeds on the theory that the surety had a voice in the making of the original contract.

He says the word promptly means that all brick should be paid for when due, without delay or extension of time.

We submit that the construction of the word "promptly" was a matter between the brick company and the contractor, and the surety company, having nothing to do with the terms of their contract, is not in a position to make complaint as to whether the contractor complied therewith "promptly" or not. Despite dictionary definitions, in commercial life, a man meets his engagements "promptly" who meets them to the satisfaction of those with whom he has made them; that man pays his debts "promptly" who pays them in a manner satisfactory to and according to some course of dealing between him and the man or men to whom his debts are due.

Counsel says, on page 15, a thing "is promptly done when it is done at the appointed time." In the case at bar, a payment made at the appointed time, October 28th, 1898, would be promptly made. We

ask, Why is not the appointed time to be regarded as the time on which they ultimately agree? The technical rule that the surety would then be bound by a contract which he had not made, does not interfere in this case, because, in this case, he must always be bound by such a contract or by none. We do not believe that the word "promptly" as used in the act should receive the construction contended for by plaintiff in error. The word was used not to restrict, but rather to enlarge. It was not intended, therefore, to say that on the very day of the first term of credit that might be fixed between the contractor and his laborers or material men, he must pay, and that, if he did not pay then and the beneficiaries under the bond did not sue then, the surety would not be liable. The word was used rather to enlarge, so that it could not be said by the surety, when sued, that the material men or laborers must wait until the work or structure the contractor had constructed for was completed.

We are dealing with a commercial proposition, and general commercial usages, of which all courts have knowledge, are more satisfactory criterions than are academic theories.

Counsel next invokes the rule in Shylock vs. Antonio, doing business as the Merchant of Venice, only he would make it necessary, according to his construction, for a creditor in the situation of the defendant in error here, to out-Shylock Shylock. He could not wait for one bottom to come in.

Counsel seems to think that, if one agreement in which the surety had no voice is substituted for another agreement in which the surety had no voice, the

surety is not liable for the performance of the last, though he was liable for the performance of the first. We have shown that the reason of all the cases holding the surety not liable on the substituted agreement is that he had a voice in the making of the first agreement and none in the making of the second. We shall not pursue the subject. As we said before, the difference is fundamental. We travel on parallel lines and hence can never meet.

We respectfully submit that technically and equitably the position of the defendant in error is right; that the law, as well as good morals, demands that both questions should be answered in the negative.

Respectfully submitted,

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